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JAN 19 1963
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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1962.

No. 682

INEZ ODLE McDONALD NEALE,
Petitioner,

vs.

EUGENE M. KINNEY AND EDWARD McCAUSLAND, CO-EXECUTORS OF THE WILL OF EUGENE F. McDONALD, JR., DECEASED,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF OF RESPONDENTS IN OPPOSITION.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Statutes and Rules Involved	2
Questions Presented	2
Statement of the Case	3
Argument	
I. The Constitutional Question Presented Was Never Properly Raised in the Courts Below	10
II. The Claimed Constitutional Question Has No Merit	14
III. The Decision Below Rests on Adequate State Grounds	18
Conclusion	23
Appendices	
A. Per Curiam Opinion of Illinois Supreme Court Denying Direct Appeal	25
B. Statutes and Rules	27
C. Motion to Transfer Appeal	30
D. Excerpt From Petitioner's Brief in Opposition to Transfer Appeal	31

Citations.

Cases.

Alton Banking and Trust Company v. Gray, 347 Ill. 99, 179 N. E. 469 13
Central U. Teleph. Co. v. Edwardsville, 269 U. S. 190 ..... 11, 12
Christopher v. West, 409 Ill. 131, 135, 98 N. E. 2d 722, 724 13
Collins v. Collins, 14 Ill. 2d 178, 151 N. E. 2d 813 22
Dewey v. Des Moines, 173 U. S. 193 13
D. L. Lee Pub. Co. v. St. Clair County, 341 Ill. 257, 173 N. E. 274 12
Foreman State Nat. Bank v. Sistek, 358 Ill. 525, 193 N. E. 513 12
Garr, Scott & Co. v. Shannon, 223 U. S. 468 ..... 20, 21
Hulbert v. Chicago, 202 U. S. 275 12
In Re Murchison, 349 U. S. 133 15
Israel v. Arthur, 152 U. S. 355 23
Neale v. Kinney, 35 Ill. App. 2d 140, 182 N. E. 2d 366 (1st Dist.) 1
Pantle v. Pantle, 19 Ill. App. 2d 353, 153 N. E. 2d 740 (1st Dist.) 11, 13
Parker v. Illinois, 333 U. S. 571 ..... 11, 12
Penn. R. R. Co. v. The John Anda Co., 131 Ill. App. 426 (1st Dist.) 5
People v. City of Waukegan, 344 Ill. 60, 175 N. E. 780 12
People v. Seymour, 272 Ill. 295, 111 N. E. 1008 13
Preston v. Chicago, 226 U. S. 447 21
Tumey v. Ohio, 273 U. S. 510 15

Van Dam v. Van Dam, 21 Ill. 2d 212, 171 N. E. 2d 594 23

Yakus v. United States, 321 U. S. 414 20

Withers v. City of Granite City, 23 Ill. 2d 156, 177 N. E. 2d 181 12

Wood v. Chesborough, 228 U. S. 672 21

STATUTES AND RULES.

Illinois Civil Practice Act

Section 72 (Ill. Rev. Stat. (1961) ch. 110, § 72) 2, 4, 19, 21, 27

Section 75(1) (Ill. Rev. Stat. (1961) ch. 110, § 75(1)) 2, 11, 28

Illinois Supreme Court Rules

Rules 19-10(4) (Ill. Rev. Stat. (1961) ch. 110, § 101.19-10(4)) 17

Rule 39 (Ill. Rev. Stat. (1961) ch. 110, § 101.39) 2, 12, 29

Rule 47 (Ill. Rev. Stat. (1961) ch. 110, § 101.47) 2, 11, 29

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OPINIONS BELOW.

The trial court delivered no opinion but entered detailed findings of fact and conclusions of law (Ad. Ab., pp. 97-117).* The *per curiam* opinion of the Illinois Supreme Court denying a direct appeal for lack of a constitutional question and transferring the cause to the Illinois Appellate Court, First District, is unreported and is printed in Appendix A hereto, *infra*, pp. 25-26. The opinion of the

* Unless otherwise indicated all record references are to respondents' printed abstract of record.

Illinois Appellate Court, First District, (Appendix I to Petition) is reported at 35 Ill. App. 2d 140, 182 N. E. 2d 366. The Illinois Supreme Court denied leave to appeal from the decision of the Appellate Court without opinion (Appendix II to Petition).

JURISDICTION.

Petitioner improperly invokes the jurisdiction of this court to review the judgment of the Illinois Supreme Court denying leave to appeal from the judgment of the Illinois Appellate Court, First District, pursuant to 28 U. S. C. § 1257 (3) because the constitutional question presented by her petition was never raised before any Illinois court having authority to entertain the same. See Argument, *infra*, pp. 10-13.

STATUTES AND RULES INVOLVED.

In addition to the constitutional provision set forth in the petition, Illinois Civil Practice Act, §§ 72 and 75(1) (Ill. Rev. Stat. (1961) Ch. 110, §§ 72, 75(1)) and Illinois Supreme Court Rules 39 and 47 (Ill. Rev. Stat. (1961) Ch. 110, §§ 101.39, 101.47) are pertinent. These provisions are set forth in Appendix B hereto, *infra*, pp. 27-29.

QUESTIONS PRESENTED.

1. Whether petitioner can invoke the jurisdiction of this court pursuant to 28 U. S. C. § 1257 (3) when the constitutional question presented by her petition for writ of certiorari was never raised in any court below having authority to entertain the same and when no constitutional question whatsoever was passed upon by any court below.

2. Whether petitioner was denied due process of law

because at or about the time of the divorce case in 1947 in which petitioner's husband was represented throughout by a well-known Chicago lawyer, petitioner's own counsel sought out a judge other than the one before whom the case was pending and requested that judge as a personal friend of petitioner's husband to discuss the marital difficulties of the parties with him and his client.

3. Whether any constitutional question was decided when the court below refused to set aside a divorce in proceedings first instituted by petitioner eleven years after entry of the divorce decree and only after her former husband's death, all courts below having found petitioner to have been under no legal disability, to have been represented by counsel of her own choosing, to have participated in the divorce proceedings, to have received and kept a substantial property settlement, and to have remarried in reliance upon the divorce decree.

STATEMENT OF THE CASE.

The question now presented for the first time by petitioner and the statement of the case contained in her petition gives an utterly false impression of the real issues and record facts in this cause.

Petitioner would have this court believe that one of the then judges of the Superior Court of Cook County acted as lawyer for petitioner's husband in divorce proceedings against petitioner in the very court in which he was sitting. Nothing could be further from the truth. Actually the record unequivocally establishes that petitioner's husband was represented in the divorce proceedings by a well-known Chicago lawyer and member of the bar of this court by the name of Irving Herriott, now deceased. No judge of the Superior Court of Cook County except the late Judge Sabath, who presided, participated in any manner in the divorce proceedings.

Petitioner's assertion in her statement of the case (Pet., p. 3) that she rests her "application for certiorari upon undisputed facts" is utterly false because practically every statement made by her is not only disputed but is shown by the record to have been found false by the trial court, the three judges of the Appellate Court, and in effect by the seven judges of the Illinois Supreme Court.

The actual issues raised by petitioner and the facts found with respect to those issues are set forth in detailed findings prepared by the trial judge and in the opinion of the Appellate Court. They establish that absolutely no constitutional question of any kind was ever passed upon by any court below and that the complaint to vacate the divorce decree pursuant to Illinois Civil Practice Act § 72, filed by petitioner eleven years after her divorce and two years after her second marriage, was barred by limitations, laches, and estoppel. We refrain from burdening the court with a further recital of these issues and findings, and limit our statement to the actual record facts material to the purported constitutional question petitioner now seeks to raise for the first time with regard to Judge Sbarbaro.

The Facts with Regard to Judge Sbarbaro.

Petitioner begins her statement of "undisputed facts" with the assertion that "[p]etitioner's husband enlisted one John A. Sbarbaro as his attorney in the matter of the parties' marital difficulties" (Pet., p. 3). The implication intended is that Sbarbaro was McDonald's attorney in the divorce proceedings. The trial court found that petitioner's husband was represented throughout the entire proceedings by Irving Herriott, a lawyer known to this court, now deceased (Finding 23, Ad. Ab. 112). *Sbarbaro at no time acted for McDonald in the divorce proceedings.* Judge

Sbarbaro, testifying by deposition as petitioner's witness, said:

> "I was not present before Judge Sabath during the McDonald divorce proceeding" (Ad. Ab. 756).

The petition next states it to be "undisputed" that Judge Sbarbaro acting as McDonald's lawyer, sought out the petitioner to coerce her into a divorce settlement (Pet., p. 3). The record shows that nothing of the kind happened. What he actually testified to was that he had been a lifelong friend of petitioner's husband, the late Commander Eugene F. McDonald, Jr. (Ad. Ab. 741); that this fact was known to Rathbun, the petitioner's lawyer (Ad. Ab. 745); that Rathbun knowing of this connection sought out Sbarbaro and made threats against McDonald believing that this would result in the communication of the threat to McDonald (Ad. Ab. 743); that Rathbun was very vicious and threatened to break up a Zenith Radio Corporation stockholders' meeting by making charges against McDonald who was president of the company (Ad. Ab. 747); that the obvious reason Rathbun had for seeking out Sbarbaro was to get the "message" to McDonald. Since petitioner read Judge Sbarbaro's deposition into evidence, under Illinois law she thus sponsored the witness and is bound by this testimony. *Penn. R. R. Co.* v. *The John Anda Co.*, 131 Fl. App. 426, 430-1.

Testifying as to how the meeting between himself and the petitioner, Mrs. McDonald, was brought about, Sbarbaro said (Ad. Ab. 747): Rathbun was "very vicious * * * He told me he going after McDonald and was going to ruin him. He said he was representing Mrs. McDonald. I told him before he made any such statement he should go into the case a little more thoroughly, because when he learned some of the truth about it on the other side, he might not feel so anxious to carry out his objective." Sbarbaro further said that he had told Rathbun "that

McDonald had proof of many acts of misconduct and that I thought he should know about them" (Ad. Ab. 751).

Subsequently, Rathbun contacted Sbarbaro and told him (Ad. Ab. 748) "that he would like to have [him] come up and talk with Mrs. McDonald in his presence." He further testified (Ad. Ab. 750): "As to the meeting I don't know whether I went to the apartment with any specific intention *except of following the suggestion made by Rathbun* that I meet with both of them and explain to her what I had told Rathbun about the charges that McDonald said he was going to make in any proceeding that might come up on the question as to the custody of the children" (Emphasis supplied).

At the meeting at Mrs. McDonald's apartment, arranged by her own attorney, Sbarbaro testified the following occurred (Ad. Ab. 752-753): "It is my recollection that on that visit I related in Mrs. McDonald's presence and within her hearing certain specific things pertaining to her alleged misconduct; that is, naming persons and places and dates." Sbarbaro further testified that the reason Rathbun gave for having him come to petitioner's apartment was that "[i]f these accusations that McDonald is making against my client are true, I want to know about it and I want my client to know about it" (Ad. Ab. 752).

After the charges of adultery and the specific facts upon which they were based had been stated by Sbarbaro, petitioner and her attorney conferred together in a separate room (Ad. Ab. 746-6). *Petitioner at no time had denied the charges.* After about a five minute conference with her attorney petitioner returned to the room in which Sbarbaro was waiting and said that McDonald could have the children (Ad. Ab. 746, 754).

At this meeting Sbarbaro also told petitioner in her lawyer's presence that if the McDonald charge that she had

committed adultery was not true, then "[i]f I were you, I would tell your lawyer to tell him [McDonald] to do as he pleased or words to that effect" (Ad. Ab. 745).

The present assertion of a constitutional question by petitioner is based on her claim that Sbarbaro's activities "amounted to such coercion as to deprive petitioner of liberty and property, without due process of law, in violation of the Fourteenth Amendment" (Pet., p. 4).

Whether or not petitioner was the victim of coercion was a question of fact decided against her by the trial court and again by the Appellate Court of Illinois. In dealing with this issue the trial court said (Finding 25; Ad. Ab. 113):

> "That no evidence has been presented by petitioner that she was induced by fraud to enter her appearance in the divorce proceeding docketed as above, but, on the contrary, the record shows that she was personally served with process and was represented in these proceedings by independent counsel of her own choosing; nor is there any evidence that she was defrauded in the property settlement merged in said decree; nor is there any showing of fraud or collusion made out against her attorney, Charles F. Rathbun, or against Irving Herriott, or against Eugene F. McDonald, Jr. and the court finds all such charges of collusion unproven and not sustained by the evidence in this case."

The trial court also found (Finding 14; Ad. Ab. 107):

> "* * * [T]here is no evidence that petifioner ever saw Eugene F. McDonald, Jr. after the 14th of June, 1947, up to and after the divorce decree was entered in the above entitled case, nor is any act of duress of any kind by McDonald, *or anyone acting on his behalf*, shown or proven during such period of time, or at any time, which caused the execution by petitioner of the aforesaid documents or any other documents concerned with the property settlement." (Emphasis supplied.)

The charge now for the first time made in this court that the conference between Judge Sbarbaro, petitioner and her counsel which took place in July of 1947, constitutes such coercion as to deprive her of due process of law cannot be sustained as a matter of law in the face of these findings of fact of the trial court.

The conclusion of law on this issue entered by the trial court and affirmed by the Appellate Court also shows this to be so. Such conclusion was that petitioner could not utilize evidence existing at the time the decree was entered to attack the divorce decree, the court saying (Conclusion 9; Ad. Ab. 116):

> "* * * [H]owever, petitioner seeks here to prove coercion, duress and fraud by evidence which could have been presented to the court by petitioner's own attorney during the divorce proceedings, at which time a full explanation of the facts could have been made and full protection given to her rights."

In commenting on these findings and conclusions, the Appellate Court of Illinois said (Pet. App. I, p. 37):

> "We think the trial judge properly concluded that 'in the face of such charges of adultery not denied by petitioner, her attorney, Rathbun, obtained all the relief in her behalf that he could reasonably have been expected to obtain by way of property settlement, alimony [and] custody of the minor children.' * * *"

The Appellate Court also found that (Pet. App. I, p. 35):

> "The evidence damaging to petitioner's cause was elicited through cross-examination and from the introduction of depositions and exhibits which had been used in part by petitioner."

It is stated at page 4 of the petition that "[a]ll of the courts of Illinois having authority to pass on the question" found that Sbarbaro had not coerced the petitioner in any way. It thus appears from petitioner's own statement of

the proceedings below that this court cannot ever reach any question remotely resembling a constitutional question without reversing all the courts of Illinois on the facts. If as found by the Courts below there was no coercion of petitioner, then obviously no constitutional question could ever exist.

ARGUMENT.

I. THE CONSTITUTIONAL QUESTION PRESENTED WAS NEVER PROPERLY RAISED IN THE COURTS BELOW.

We most respectfully suggest that this court has no original jurisdiction to rule on a constitutional question in a case coming from a state court. To present such a question on petition for writ of certiorari pursuant to 28 U.S.C., § 1257 (3), petitioner must show that the question was properly raised and decided against her by the highest court of the state in which a decision could be had. The alleged constitutional question presented is defined by petitioner as follows (Pet., p. 4):

> "All of the courts of Illinois having authority to pass upon the question (the trial court and the Illinois Supreme Court) ruled against petitioner's contention that Sbarbaro's activities as counsel in a matter pending in a Court of which he was a judge amounted to such coercion as to deprive petitioner of liberty and property without due process of law, in violation of the Fourteenth Amendment."

No such question was ever presented for decision to either the trial court or the Illinois Supreme Court.

Petitioner's complaint to set aside the divorce decree, as originally filed in the trial court, presented no constitutional question whatever (Ad. Ab. 1-20). It was devoted entirely to a recital of alleged acts of cruelty, fraud, perjury and collusion by her counsel. Later during the trial petitioner obtained leave to file an amendment which alleged that she was denied due process of law through the introduction of perjured testimony at the original divorce hearing and by reason of the various acts complained of

in her complaint (Ad. Ab. 94). But neither her complaint nor her amendment thereto ever alleged in any manner that she was denied any constitutional right by reason of Judge Sbarbaro acting as a lawyer for her then husband. Judge Sbarbaro was not even named or mentioned or referred to in any way.

The findings of fact and conclusions of law entered by the trial court at the conclusion of the trial further demonstrate that no constitutional question of any kind was decided in this proceeding (Ad. Ab. 97, 114). The trial court was not thereby evading any such question because even the proposed findings and conclusions submitted by petitioner contained absolutely no reference to Judge Sbarbaro or any constitutional question with reference to him (Petitioner's Abstract of Record, pp. 87-99).

Following dismissal of her complaint petitioner prosecuted a direct appeal to the Illinois Supreme Court (Ad. Ab. 118) and respondents moved (App. C., p. 30) to transfer the appeal to the Appellate Court, First District, on the ground that no constitutional question was presented by the decision of the trial court.*

Petitioner filed a brief in opposition to the motion in

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* Under Illinois Appellate practice all appeals involving both federal and state constitutional questions must be taken directly to the Illinois Supreme Court and the Appellate Courts of Illinois have no jurisdiction to entertain such questions. Illinois Civil Practice Act, § 75(1) (Ill. Rev. Stat. (1961) Ch. 110, § 75(1)), set out in Appendix B hereto, *infra*, p. 28. This court took notice of this practice in deciding *Parker* v. *Illinois*, 333 U. S. 571, 573-4 and *Central U. Teleph. Co.* v. *Edwardsville*, 269 U. S. 190, 194. See also *Pantle* v. *Pantle*, 19 Ill. App. 2d 353, 367, 153 N. E. 2d 740, 748.

Illinois Supreme Court Rule 47 (Ill. Rev. Stat. (1961) Ch. 110, § 101.47) set out in Appendix B hereto, *infra*, p. 29, provides that any cause improperly appealed (viz., for lack of a constitutional question) shall be transferred to the proper court on motion and "[t]he case shall proceed from that point in all respects as though the appeal had originally been taken to the proper court."

which she again raised the same constitutional charges set out in her trial court amendment to the complaint (App. D, p. 31). Judge Sbarbaro was not named or mentioned or referred to in any way and again no question was raised with regard to him in any part of her brief.

Under established Illinois practice assignments of error are no longer necessary but a party must set forth in his brief the points on which he relies and all other points are deemed waived. Illinois Supreme Court Rule 39 (Ill. Rev. Stat. (1961) Ch. 110, § 101.39) set forth in Appendix B. *infra*, p. 29. See *Withers* v. *City of Granite City*, 23 Ill. 2d 156, 158, 177 N.E. 2d 181, 182.

This court has recognized the Illinois practice in this regard and has refused to review questions which have not been presented in a petitioner's brief before the Illinois Supreme Court. *Hulbert* v. *Chicago*, 202 U. S. 275, 281.

Furthermore, under Illinois practice, constitutional questions not presented to the trial court cannot be raised *de novo* before the Illinois Supreme Court. *Foreman State Nat. Bank* v. *Sistek*, 358 Ill. 525, 529-30, 193 N. E. 513, 515; *People* v. *City of Waukegan*, 344 Ill. 60, 61, 175 N. E. 780; *D. L. Lee Pub. Co.* v. *St. Clair County*, 341 Ill. 257, 260, 173 N. E. 274, 275.

Only after the Illinois Supreme Court determined that the cause had been wrongfully appealed and ordered that cause transferred to the Appellate Court (App. A., pp. 25-26), did petitioner for the first time assert a constitutional question with regard to Judge Sbarbaro's role in the original divorce proceedings (Pet. App. III, p. 41). But petitioner concedes at p. 12 of her petition that the Appellate Court has no jurisdiction to entertain constitutional questions and this court has so acknowledged in previous cases coming from Illinois. *Parker* v. *Illinois*, 333 U. S. 571, 573-4; *Central U. Teleph. Co.* v. *Edwardsville*,

269 U. S. 190, 194; see also *Pantle* v. *Pantle*, 19 Ill. App. 2d 353, 367, 153 N. E. 2d 740, 748. The Appellate Court decision affirming the judgment of the trial court therefore was necessarily based on non-federal grounds and its opinion demonstrates this to be true.

Further, when petitioner sought leave to appeal from the judgment of the Appellate Court, the Illinois Supreme Court could not entertain any constitutional question which she chose to assert in her petition (Pet. App. IV, p. 42) because under state law that court is limited to review of only those questions properly raised and passed upon by the Appellate Court. *Christopher* v. *West*, 409 Ill. 131, 135, 98 N. E. 2d 722, 724; *People* v. *Seymour*, 272 Ill. 295, 300, 111 N. E. 1008, 1011; *Alton Banking and Trust Co.* v. *Gray*, 347 Ill. 99, 104, 179 N. E. 469, 471.

It thus appears that petitioner never asserted her present constitutional question either in the trial court or before the Illinois Supreme Court on her direct appeal and that no constitutional question of any kind was ever decided in this case.

To be sure petitioner raised another constitutional question in the amendment to her complaint and on her direct appeal to the Illinois Supreme Court but the only connection between that question and the one here presented concerning Judge Sbarbaro is that each purports to be based on the due process clause of the Fourteenth Amendment. This is not enough to confer jurisdiction on this Court. *Dewey* v. *Des Moines*, 173 U. S. 193.

II. THE CLAIMED CONSTITUTIONAL QUESTION HAS NO MERIT.

Under the facts shown in this record Judge Sbarbaro's activities induced by petitioner's own counsel did not constitute any denial of due process of law.

Judge Sbarbaro did not act as a judge in the divorce case. The case was heard and determined by Judge Sabath after a hearing at which petitioner was present and represented by counsel of her own choosing and at which Commander McDonald was represented by Irving Herriott. Sbarbaro was not even present at any divorce hearing (Ad. Ab. 756). This is conceded at page 6 of the petition, as follows:

> "Petitioner was represented by one Mr. Rathbun, a Chicago lawyer.
>
> "Mr. McDonald was represented by the counsel of record, none of whom was a judge of any court."

The petition then says:

> "But as an adjuvant to the services of his counsel of record, Mr. McDonald enlisted the services of John A. Sbarbaro, then a judge of the Superior Court of Cook County, in which court McDonald's suit was pending."

There is no evidence that McDonald enlisted Sbarbaro's services as an "adjuvant" or otherwise in the divorce proceedings. Sbarbaro became involved in conversations with the petitioner at the request of her own lawyer so that she could know first hand the nature of the charges she was facing if she attempted to retain custody of the minor children (Ad. Ab. 750). Further, the only way Sbarbaro acquired any contact with the matter was because petitioner's lawyer Rathbun wanted to use him as a conduit to carry his threats to McDonald. Sbarbaro was

merely a friend of McDonald's brought into the controversy solely at the inducement of petitioner and her counsel (Ad. Ab. 748, 750).

Finally, petitioner was represented by counsel of her own choosing at every contact with Sbarbaro. If Sbarbaro had used any coercive methods of any kind Rathbun was in a position to bring the matter to the attention of presiding Judge Sabath, where petitioner's rights would have been fully protected.

The cases cited by petitioner at page 14 of the petition obviously have no bearing on the facts presented by the instant record:

Tumey v. *Ohio*, 273 U. S. 510, involved a situation in which the judge had a financial interest in the matter he was hearing. What was involved there was a "temptation" that the presiding judge might "forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true. * * *" (273 U. S. at p. 532). Here Judge Sbarbaro was not hearing anything. The presiding judge was Judge Sabath. Judge Sbarbaro never appeared in any manner in the court proceedings. There is no showing on the record and none could be made that the late Judge Sabath had any interest of any kind in the outcome of the McDonald divorce case.

In Re Murchison, 349 U. S. 133, is equally inapposite. There a judge sitting as a one man jury charged a witness with perjury. The subsequent trial for contempt before the same judge who made the charge was held to constitute a denial of due process.

Judge Sabath preferred no charges against petitioner and was not "a judge in his own case." He had no interest in the outcome of the divorce proceedings. Obviously the instant case does not remotely resemble the situation in *Murchison*.

Without the support of any precedent and in the face of a record replete with findings of fact disproving the charge, the petitioner now says, "[d]enial of due process was inherent in the coercive effect * * *" (Pet., p. 15). Yet the trial court, affirmed by the Illinois courts of review, found as a fact that there was no coercion practiced on petitioner at the time of the divorce by McDonald "or anyone acting on his behalf." (Ad. Ab. 107.)

The trial court, affirmed by the Illinois courts of review, also found as a fact that there was no "showing of fraud or collusion made out against her attorney, Charles F. Rathbun; * * *" (Ad. Ab. 113.)

This leaves the case in a posture where petitioner and her attorney agreed to the property settlement and decree with full knowledge of the facts and of all of Sbarbaro's activities; where if there had been any fraud or coercion practiced on petitioner, her attorney Rathbun was in a position to bring the matter to the attention of Judge Sabath so that her rights could be protected. Now, sixteen years later petitioner for the first time claims that a conversation which she had with the late Judge Sbarbaro in the presence of her own lawyer and which was arranged and conducted by her lawyer, constitutes a denial of due process of law.

We submit there is no merit in the contention even if this court were in a position to hear all the facts *de novo*. However, petitioner concedes that "[t]his court will not weigh contradictory testimony or assess credibility upon controverted questions of objective fact." (Pet., p. 17.) She attempts to avoid the devastating effect of this concession by saying that the facts are "undisputed," but in truth the issue of whether or not petitioner was under any coercion at the time of the divorce takes up a substantial part of this 5,000 page record.

The Appellate Court disposed of this issue by saying that the trial judge could well have inferred that unless the charge of adultery "were true and she feared exposure, they would have had no effect upon petitioner and her parents, and in fact she would not have relinquished custody of her children in the first place" (Pet. App. I, p. 33). The court said further, "In any event, the trial judge had before him ample evidence to support the finding that petitioner was not mentally incompetent throughout the eleven year period and was not subjected to, or affected by, threats and pressures sufficient to constitute legal duress." (Pet. App. I, p. 33.)

At page 18 of the petition language from respondents' answer to the petition for leave to appeal is quoted to the effect that "the testimony of the judge [Sbarbaro] in his deposition completely destroys the petitioner's case." This statement referred to Judge Sbarbaro's testimony that at the time petitioner was trying to convince the trial court that she was so insane as to be a "basket case", she actually was as sane as anyone the judge had ever seen.

It should be borne in mind that this testimony was not proffered by the respondents but by the petitioner herself (Ad. Ab. 740-44, 748-58). Her own counsel read the deposition of Judge Sbarbaro into evidence and thereby sponsored the judge as her witness.* The judge did not give evidence "as a result of his conjoint use of his judge's robes, his license to practice law, and the privilege of attorney and client" (Pet., p. 18) but because the petitioner called him as

*Certain portions of the Sbarbaro deposition which petitioner attempted to delete (Ad. Ab. 744-748) were read in by respondent's counsel as part of petitioner's case pursuant to Illinois Supreme Court Rule 19-10(4) (Ill. Rev. Stat. (1961) Ch. 110, § 101.19-10(4)) which provides: "If only part of a deposition is read or used at the trial by a party, any other party may at that time read or use or require him to read any other part of the deposition which ought in fairness to be considered in connection with the part read or used."

her witness and read his testimony into the record. The fact that the evidence she sponsored destroyed her case cannot be charged to these respondents nor does this result constitute a denial of due process of law. Whatever difficulties Judge Sbarbaro's testimony created for petitioner was occasioned by her sponsoring his testimony which she did voluntarily and while represented by able and independent counsel.

III. THE DECISION BELOW RESTS ON ADEQUATE STATE GROUNDS.

In seeking to excuse her 11 year delay in instituting these proceedings petitioner first urged in the courts below that the challenged divorce decree was void and therefore subject to attack at any time. The Illinois courts found against her on this contention.

The Appellate Court in its opinion, which opinion the Illinois Supreme Court in effect affirmed by refusing to review it, held that the divorce decree was not void. The Appellate Court said (Pet. App. I, pp. 27-8):

> "It has long been the law of this state that a void judgment may be set aside at any time by motion or petition. * * * The error importing voidness, however, must be apparent from an examination of the record, as the court cannot review the evidence. * * * The record, in a chancery case, consists of the pleadings, process and decree (*Collins* v. *Collins*, 14 Ill. 2d 178, 183). * * *
>
> "It is clear from the record in the divorce proceedings that petitioner was personally served, that she stipulated to have the case heard as a default matter, and that she was represented by her counsel, at the hearing. The decree found, as alleged in the complaint, that * * * on, to wit, June 1, 1945, the defendant wilfully deserted and absented herself from the plaintiff without any reasonable cause, and without

fault on his part, and continued so to do without interruption for more than two (2) years since said date to the present time and the filing of the complaint herein.' Petitioner would have us declare that the trial judge found that the statutory grounds of desertion and entered the decree on the basis of mistaken judgment. This we cannot do. (*Van Dam* v. *Van Dam*, 21 Ill. 2d 212). Petitioner's right to seek review of the transcript of evidence, on appeal or by writ of error, has long since passed. The record does not show on its face that the divorce decree was erroneous."

Petitioner next alleged below that even if the divorce decree were not void but voidable only, her complaint to vacate that decree pursuant to Civil Practice Act, § 72, was not barred because the two-year limitations provision in that statute was tolled by reason of mental disability and duress practiced upon her by McDonald. All courts below also found against petitioner on this contention. In its opinion the Appellate Court said (Pet. App. I, pp. 30, 33):

"The petition in the instant case was filed more than eleven years after the entry of the divorce decree. At no time during that period did petitioner seek relief by way of a bill of review or writ of error *coram nobis*. Both of these procedural methods, upon which the period of limitation was one year, were superseded by the unified procedure provided in Sect. 72 of the Civil Practice Act which became effective on January 1, 1956. The part of that section pertinent here reads:

'(3) The petition must be filed not later than 2 years after the entry of the order, judgment or decree. Time during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently concealed shall be excluded in computing the period of 2 years.'

"The instant petition was filed neither within the limitation period provided under the former practice nor within that afforded by Sect. 72(3). Petitioner claims that the limitation period was tolled because of the continuing duress exerted over her by respondent,

which did not terminate until May of 1958, when the respondent died. . . .

"• • • In any event, the trial judge had before him ample evidence to support the finding that petitioner was not mentally incompetent throughout the eleven year period and was not subjected to, or affected by, threats and pressures sufficient to constitute legal duress. Accordingly, it is our view that the trial judge properly determined that the period of limitations under 72(3) was not tolled and that petitioner's claim is therefore barred."

Thus all the courts of Illinois have held unequivocably that petitioner's complaint to set aside a divorce decree found not to be void was barred by limitations and laches. Unless this Court is prepared to review and reverse the courts of Illinois on these questions of state law, nothing remains to be decided in this case.

On more than one occasion this Court has observed that even meritorious constitutional claims can be lost if not asserted in time. As stated in *Yakus* v. *United States*, 321 U. S. 414, 444-5:

"No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. • • • While this court in its discretion sometimes departs from this rule in cases from lower federal courts, it invariably adheres to it in cases from state courts, • • •".

As a result limitations and laches have been recognized as a wholly adequate state grounds for decision, barring review of companion federal questions by this Court. See *Garr, Scott & Co.* v. *Shannon*, 223 U. S. 468, where it is stated at p. 470:

"• • • [A]s repeatedly ruled, where a state court has

> decided against the plaintiff in error on a matter of general law broad enough to sustain the judgment, this court will not consider the Federal questions, even though they may have been actually considered and determined adversely to his contention. * * * The principle has been enforced in cases where the ruling of the state court was based on the application of the doctrine of *res judicata*, laches, statute of limitations, and others. * * *"

To the same effect see *Wood* v. *Chesborough*, 228 U. S. 672; *Preston* v. *Chicago*, 226 U. S. 447.

Petitioner now urges a further contention never presented in the courts below to avoid the limitations provision of Civil Practice Act, § 72(3). She says now for the first time that "[t]he denial of due process continued until the death of the husband in 1958," because a confidential relationship "in the nature of an attorney-client relationship existed between McDonald and Judge Sbarbaro." (Pet., pp. 21-2). This is a complete *non sequitur*.

How any conduct of Judge Sbarbaro eleven years before the instant proceedings were instituted could fatally affect these proceedings is not pointed out. Nor is the fact that Sbarbaro was a friend of McDonald's and from time to time advised him on personal matters of any significance. Obviously Sbarbaro was not practicing law but even if he had been it would have had no significance here because he was not hearing the matter as a judge or appearing on Mr. McDonald's behalf.

The courts below found as a further and separate ground for decision that by virtue of her acceptance of a substantial property settlement and her reliance on the divorce decree in effecting remarriage petitioner was estopped from attacking the validity of that divorce decree. The Appellate Court said (Pet. App. I, p. 34):

> "* * * Petitioner accepted the proceeds of the prop-

> erty settlement and put them to her own use. As respondent had died when petitioner filed her claim, no question of her status as a wife is involved. All she seeks is an additional portion of respondent's assets. Petitioner remarried in 1956 thereby relying upon and asserting the validity of the divorce decree. Her second marriage continued to exist in all respects at the time she filed this petition in 1958. She had not annulled it, nor had she disavowed it in any way at any time other than in the instant suit which was filed solely for the purpose of obtaining part of respondent's estate. The rule of estoppel, founded upon the public policy of protecting the marital status and good character of innocent third persons, the legitimacy of children, and the rights and position of persons whose status has been finalized by decree of divorce, will not permit parties to assert inconsistent legal rights as petitioner has here attempted. Under the facts of this case the rule of estoppel was appropriately applied."

In the face of this holding petitioner states that the substantive law of some states "is such that remarriage of a party to a voidable or even a theretofore absolutely void decree of divorce works a 'waiver' or 'estoppel' so that the remarried spouse cannot attack the divorce. But Illinois is not one of the States adhering to this rule." (Pet., p. 19). This contention rests upon her unsound argument concerning *Collins* v. *Collins*, 14 Ill. 2d 178, 151 N. E. 2d 813.

In the instant case the Appellate Court of Illinois distinguished the *Collins* case as follows (Pet. App. I, p. 35):

> "In *Collins* the Court's language concerning the effect of petitioner's remarriage upon her rights to collaterally attack the decree was stripped of its significance when the Court pointed out that 'this issue was not presented to the lower court for consideration, and is obviously waived.' *Collins* v. *Collins*, 14 Ill. 2d 178, 185."

Since the Supreme Court of Illinois refused to grant leave to appeal in the instant case, it must have agreed with the comment of the Appellate Court with reference to *Collins** and its decision on the issue of estoppel.

Further, this Court has recognized in precisely this type of case that estoppel constitutes an adequate state ground for decision. In *Israel* v. *Arthur*, 152 U. S. 355, it was decided that no reviewable federal question was presented by a state court judgment which held a woman estopped to contest the validity of a divorce decree under which she had profited and had exercised the privilege of remarriage despite her contention that the decree was void and amounted to a denial of due process of law, the court stating, at p. 362:

> "To review that judgment would be to overhaul the application by a state court of principles of public policy and of estoppel, which is not within our province to do."

CONCLUSION.

We most respectfully submit that petitioner's present due process contention is an afterthought never properly presented for review before the Supreme Court of Illinois and in any event is barred by limitations, laches, and estoppel. For the reasons given herein, the petition for writ of certiorari should be denied.

Respectfully submitted,

THOMAS C. MCCONNELL,
134 South La Salle Street,
Chicago 3, Illinois,
Counsel for Respondents.

January 19, 1963.

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* In the later case of *Van Dam* v. *Van Dam*, 21 Ill. 2d 212, 218, 171 N. E. 2d 594, 598, the Illinois Supreme Court itself said that *Collins* should only be regarded as a precedent on the special factual showing there involved.

APPENDIX A.

Per Curiam Opinion of Illinois Supreme Court Denying Direct Appeal and Transferring Cause to Appellate Court, First District.

STATE OF ILLINOIS, }
SUPREME COURT. } ss.

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the twelfth day of September in the year of our Lord, one thousand nine hundred and sixty, within and for the State of Illinois.

Present: Walter V. Schaefer, Chief Justice.
Justice Joseph E. Daily Justice George W. Bristow
Justice Harry B. Hershey Justice Ray I. Klingbiel
Justice Byron O. House Justice Roy J. Solfisburg, Jr.

William L. Guild, Attorney General.
Robert G. Miley, Marshal.

Attest: Mrs. Earle Benjamin Searcy, Clerk.

BE IT REMEMBERED, that, to-wit: on the 21st day of September, A. D. 1960, the same being one of the days of the term of court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

EUGENE F. McDONALD, JR.
vs.
INEZ RIDDLE McDONALD

INEZ RIDDLE McDONALD NEALE,
Appellant,
vs.
EUGENE M. KINNEY AND EDWARD McCAUSLAND, Co-Executors of the Will of EUGENE F. McDONALD, JR., Deceased,
Appellees.

No. 36111

Appeal from Superior Court, Cook County.

47 S 12849.

And now, on this day, the Court having diligently examined and inspected the record and proceedings aforesaid, together with the motion by appellees that this cause be transferred, and now being fully advised in the premises is of the opinion, find and adjudge that this case was wrongfully appealed to this Court.

THEREFORE, it is ordered by the Court that this case be and the same is hereby transferred to the Appellate Court for the First District of the State of Illinois, and the Clerk of this Court is directed to transmit the transcript and files herein with the order of this transfer to the Clerk of said Appellate Court.

APPENDIX B.

Illinois Civil Practice Act, § 72.

(Ill. Rev. Stat. (1961) Ch. 110, § 72.)

Relief from Judgments and Decrees.

(1) Relief from final orders, judgments and decrees, after 30 days from the entry thereof, may be had upon petition as provided in this section. Writs of error coram nobis and coram vobis, writs of audita querela, bills of review, and bills in the nature of bills of review are abolished. All relief heretofore obtainable and the grounds for said relief heretofore available, either at law or in equity, whether by any of the foregoing remedies or otherwise, shall be available in every case, by proceedings hereunder, regardless of the nature of the order, judgment or decree from which relief is sought or of the proceedings in which it was entered. There shall be no distinction among actions at law, suits in equity and other proceedings, statutory or otherwise, as to availability of relief, grounds for relief or the relief obtainable.

(2) The petition must be filed in the same proceeding in which the order, judgment or decree was entered but is not a continuation thereof. The petition must be supported by affidavit or other appropriate showing as to matters not of record. All parties to the petition shall be notified as provided by rule.

(3) The petition must be filed not later than 2 years after the entry of the order, judgment or decree. Time during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently

concealed shall be excluded in computing the period of 2 years.

(4) The filing of a petition under this section does not affect the order, judgment or decree, or suspend its operation.

(5) Unless lack of jurisdiction affirmatively appears from the record proper, the vacation or modification of an order, judgment or decree pursuant to the provisions of this section does not affect the right, title or interest in or to any real or personal property of any person, not a party to the original action, acquired for value after the entry of the order, judgment or decree but before the filing of the petition, nor affect any right of any person not a party to the original action under any certificate of sale issued before the filing of the petition, pursuant to a sale based on the order, judgment or decree.

(6) Any order entered denying or granting any of the relief prayed in the petition is appealable.

(7) Nothing contained in this section affects any existing right to relief from a void order, judgment or decree, or to employ any existing method to procure that relief.

Illinois Civil Practice Act, § 75(1).

(Ill. Rev. Stat. (1961) Ch. 110, § 75(1).)

providing in pertinent part:

Jurisdiction of Appellate and Supreme Courts.

(1) Appeals shall be taken directly to the Supreme Court (a) in all cases in which a franchise or freehold or the validity of a statute or a *construction of the constitution is involved.* . . . [Emphasis supplied.]

Illinois Supreme Court Rule 39.

(Ill. Rev. Stat. (1961) Ch. 110, § 101.39.)

providing in pertinent part:

Briefs.

(1) * * *.

In all cases of appeal to this court, directly from the trial court or as a matter of right from the Appellate Court, there shall be set forth, preceding the Points and Authorities and under an appropriate heading a clear and concise statement of the grounds relied upon to warrant this court in entertaining jurisdiction of the appeal.

IV. * * *.

No alleged error or point not contained in the brief shall be raised afterwards, either by reply brief or in oral or printed argument or on petition for rehearing.

Illinois Supreme Court Rule 47.

(Ill. Rev. Stat. (1961) Ch. 110, § 101.47.)

Transferred Causes.

If any cause is appealed to this court which should have been appealed to an Appellate Court, or vice versa, it may be transferred to the proper court on motion, and upon an order for transfer being made all documents already filed shall be transmitted by the clerk to the proper court. The case shall proceed from that point in all respects as though the appeal had originally been taken to the proper court.

APPENDIX C.

Motion to Transfer Appeal From Illinois Supreme Court to Illinois Appellate Court, First District, for Lack of a Constitutional Question.

IN THE SUPREME COURT OF ILLINOIS.

INEZ RIDDLE MCDONALD NEALE, *Petitioner-Appellant,* *vs.* EUGENE M. KINNEY and EDWARD MCCAUSLAND, Co-Executors of the Will of EUGENE F. MCDONALD, JR., Deceased, *Respondents-Appellees.*	Appeal from the Superior Court of Cook County. Honorable Thaddeus V. Adesko, Presiding Judge.

MOTION TO TRANSFER APPEAL.

Now Come Appellees, Eugene M. Kinney and Edward McCausland, Co-Executors of the Will of Eugene F. McDonald, Jr., Deceased, by their attorney, Thomas C. McConnell, and move, pursuant to Rule 47 of the Supreme Court Rules, that this Appeal be transferred to the Appellate Court, First District, for the reason that no question concerning construction of the constitution is presented so as to give this court jurisdiction on direct appeal pursuant to Civil Practice Act, Section 75(1).

APPENDIX D.

Petitioner's Brief in Opposition to Motion to Transfer Appeal From Illinois Supreme Court to Appellate Court, First District, pp. 10, 11.

II.

THE DECISION OF THE TRIAL COURT WHICH UPHOLDS THE ALLEGEDLY VOID DECREE OF DIVORCE, RAISES A FAIRLY DEBATABLE CONSTITUTIONAL QUESTION.

The respondents greatly oversimplify the matter presently before the Court when they state, in their "Suggestions," that appellant's petition raised no debatable constitutional question, but raised "only a question concerning the validity of the divorce decree." It is true that the validity of the divorce decree is under attack. The constitutional question, of course, is not patent from so cursory a statement of the case. The constitutional question is, however, glaringly involved in the asserted grounds for the invalidity of said divorce decree.

The petition contended that appellant was deprived of her rights of property without due process of law in that such deprivation was pursuant to a decree which was void because obtained by perjury and fraud and because the court lacked the inherent power to enter such decree. The petitioner was also deprived of her rights of property without due process of law because said decree was obtained through collusion and conspiracy, at a time when petitioner was mentally incompetent, and under circumstances amounting to a denial of counsel.